No. 83-63

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 323, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably concluded that the Union unlawfully restrained and coerced an employer's selection of a grievance-handling supervisor by fining and expelling a member holding that position because his employer was nonunion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 703 F.2d 501. The decision and order of the National Labor Relations Board (Pet. App. 37a-42a) and the decision of the administrative law judge (Pet. App. 15a-36a) are reported at 255 N.L.R.B. 1395.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1983 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, is set forth in Pet. 2.

STATEMENT

1. The conduct at issue here is petitioner's discipline of John Willey, a member of Local 725 of the International Brotherhood of Electrical Workers ("IBEW") (Pet. App. 17a). Willey was electrical superintendent for Drexel Properties, Inc., a nonunion land developer and construction contractor in Florida (Pet. App. 16a-17a). His duties as superintendent included the disposition of employee complaints and grievances (Pet. App. 17a). Willey was a certified master electrician and, through use of his master's certificate, obtained electrical work permits from the county to enable Drexel to perform electrical contracting (Pet. App. 17a-18a). Willey was a salaried employee of Drexel; he neither shared in its profits nor held any ownership interest in it (Pet. App. 18a).

Petitioner brought internal union charges against Willey and, after various proceedings, fined him a total of $7,150 for allegedly violating the International IBEW constitution and the area working agreement by working for Drexel, a nonunion company, and using his master electrician's certificate to obtain electrical work permits for Drexel (Pet. App. 37a, 18a-26a). Thereafter, petitioner offered to suspend $5,150 of the fines if Willey would pay the remaining $2,000. When Willey refused on the ground that he was appealing the fines, petitioner expelled him from the IBEW (Pet. App. 26a).

2. The Board, in agreement with the administrative law judge, found that petitioner coerced and restrained Drexel's selection and retention of Willey as a supervisor, in violation of Section 8(b)(1)(B) of the Act, 29 U.S.C. 158(b)(1)(B), by disciplining Willey for working for Drexel and using his master electrician's certificate to secure electrical work permits for Drexel (Pet. App.

29a-31a, 37a-42a).[1] In so finding, the Board rejected petitioner's argument that Willey himself became an employer, rather than a supervisor, by using his master's certificate to obtain electrical work permits for Drexel, and that its discipline of him therefore did not restrain or coerce Drexel's selection or retention of a supervisor (Pet. App. 31a).

The Board's order directed petitioner to cease and desist from the unfair labor practices found; to expunge all record of the disciplinary action taken against Willey; to rescind the fines; reinstate Willey as a member in good standing of IBEW; and to post appropriate notices (Pet. App. 33a-36a, 38a).

3. The court of appeals affirmed the Board's findings and enforced its order (Pet. App. 1a-14a). It concluded that "because [Willey] was fined for his affiliation with a nonunion company, 'compliance * * * with [petitioner's] demands would have "the effect of depriving [Drexel] of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances"'" and that "[s]uch a potential adverse effect on the employer's choice is determinative" under Section 8(b)(1)(B) (Pet. App. 8a).[2] The court rejected petitioner's contention that its discipline of Willey was lawful because petitioner neither represented Drexel's employees nor showed any intent to do

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[1] The Board noted that Drexel needed an electrical superintendent who had a master electrician's certificate and would use his certificate on Drexel's behalf (Pet. App. 38a). It held (Chairman Fanning dissenting) that petitioner's fine of Willey for using his certificate on Drexel's behalf amounted to "an attempt to influence Drexel's selection of Willey as its electrical superintendent every bit as much as [its] flat attempt to prohibit him from working for this nonunion employer" and was "part and parcel of the same violation" (*ibid.*).

[2] The court noted (Pet. App. 8a) that uncontroverted evidence supported the Board's finding that Willey had "extensive grievance adjustment responsibilities in his capacity as Drexel's electrical superintendent."

so (Pet. App. 8a-12a). It held that such a restrictive interpretation of Section 8(b)(1)(B) is unwarranted (Pet. App. 11a), noting that, in any event, testimony at the hearing suggested that petitioner "may indeed have had an interest in representing Drexel's employees" (Pet. App. 10a n.7). The court also rejected petitioner's contention that Willey's use of his master's certificate to secure electrical work permits for Drexel made Willey himself an employer, rather than a supervisor, and thus made Section 8(b)(1)(B) inapplicable (Pet. App. 12a-14a). Because Willey had no financial ownership interest in Drexel, the court affirmed the Board's finding that Willey's securing of electrical work permits did not make him an employer; Willey, as a supervisor, was merely acting as a managerial agent for Drexel (Pet. App. 13a).

ARGUMENT

The decision of the court of appeals is clearly correct. It accords with the controlling decision of this Court interpreting Section 8(b)(1)(B) and does not conflict with the decisions of any other court of appeals. Review is thus unwarranted.

1. Section 8(b)(1)(B) of the Act makes it an unfair labor practice for a labor organization "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Willey was employed as a supervisor for Drexel, with extensive grievance adjustment responsibilities. The Board reasonably concluded that petitioner's fines and expulsion of Willey for serving in that capacity for Drexel, and securing needed electrical permits on Drexel's behalf, constituted restraint and coercion of Drexel in the selection and retention of Willey as its representative for the adjustment of grievances.

2. The Board's decision is consistent with this Court's decision in *American Broadcasting Compa-*

nies, Inc. v. *Writers Guild, Inc.*, 437 U.S. 411 (1978) ("*ABC*"). In that case, the Court held that Section 8(b)(1)(B) prohibits union discipline of supervisor-members that "may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks" (437 U.S. at 430). The Court stated that union pressure which could cause supervisors to be unwilling to perform their jobs had an unlawful adverse effect because it deprived the employer of his right to choose those supervisors as his grievance-handling or collective-bargaining representatives (*id.* at 432, 436). To illustrate the unlawful effect, the Court cited with approval *New Mexico District Council (A.S. Horner, Inc.)*, 177 N.L.R.B. 500 (1969), enforced, 454 F.2d 1116 (10th Cir.1972), in which the union disciplined a supervisor-member because he worked for a nonunion employer (437 U.S. at 436 n.36). It stated, "a fine imposed in these circumstances violated the section because compliance by the supervisor with the union's demands would have required his leaving his job and thus have 'the effect of depriving the Company of the services of its selected representative for the purposes of collective-bargaining or the adjustment of grievances.'" *Ibid.*, quoting *A.S. Horner, supra*, 177 N.L.R.B. at 502.[3] The situation here is virtually identical to that in *A.S. Horner*.

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[3] Petitioner's contention (Pet. 7-8) that the court of appeals held unlawful all discipline having "any effect" on supervisors who adjust grievances or engage in collective bargaining is inaccurate. The court quite clearly focused upon whether petitioner's discipline of Willey could have the effect of depriving Drexel of his services altogether (Pet. App. 6a-8a), and concluded that "[s]uch a potential adverse effect on the employer's choice is determinative under the Supreme Court's test" (Pet. App. 8a).

In *ABC*, this Court also rejected an argument analogous to petitioner's contention (Pet. 6-8) that employers should be protected by Section 8(b)(1)(B) only if their employees are represented by the disciplining union, or if the union has shown an interest in representing the employees. In that case the union (which represented writers in the film industry) disciplined directors, as well as other supervisor-members, for working during a writers' strike. The directors neither supervised writers nor adjusted their grievances, and the union argued that this lack of a nexus exempted its discipline of the directors from the reach of Section 8(b)(1)(B). This Court rejected the union's contention. It noted that the directors adjusted other employees' grievances, and held that a "union may no more interfere with the employer's choice of a grievance representative with respect to employees represented by other unions than with respect to those employees whom it itself represents." *ABC*, *supra*, 437 U.S. at 437-438 n.37. The scope of Section 8(b)(1)(B) does not hinge on the disciplining union's representational interest or its motivation, but rather on whether its pressure "may adversely affect" the supervisor's performance of protected duties." 437 U.S. at 429.[4]

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[4] There is no merit to petitioner's contention (Pet. 6-8) that the court of appeals' decision here conflicts with the Ninth Circuit's decision in *NLRB* v. *Local Union No. 73 (Chewelah Contractor's, Inc.)*, 621 F.2d 1035, 1037 (1980) (*"Chewelah"*). The Ninth Circuit in *Chewelah* found that the disciplining union lacked a representational interest in the employer's employees and therefore held that its discipline of the employer's supervisor for working nonunion did not violate Section 8(b)(1)(B) (621 F.2d at 1037). Here, by contrast, as the court of appeals observed (Pet. App. 10a n.7), the record suggests that petitioner "may indeed have had an interest in representing Drexel's employees." There was evidence that petitioner daily approached electrical employees and asked them to sign its working agree-

3. Nor is there merit in petitioner's effort (Pet. 8-10) to bring itself within the rationale of Board cases holding that Section 8(b)(1)(B) is not applicable to union discipline imposed on a member with a substantial financial ownership interest in the employer. In the absence of any evidence that Willey shared in Drexel's profits or had any financial interest in the company, the Board reasonably concluded that Willey was not an employer, but a supervisor-member, and that petitioner's discipline of him fell squarely within the prohibition of Section 8(b)(1)(B) (Pet. App. 31a, 12a-13a).

Petitioner's contention (Pet. 8) that Willey's use of his master's certificate to secure electrical work permits for Drexel was "an ownership function which, for § 8(b)(1)(B) purposes, made Willey the equivalent of an owner" does not present an issue warranting further review. The line drawn by the Board between a financial ownership interest in an employer and the mere performance of a supervisory or managerial function for the employer is a rational one (Pet. App. 13a).[5] The

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ment (Tr. 422), that the IBEW had requested recognition from Drexel (Tr. 44), and that, just before petitioner filed its second set of charges against Willey, he had refused its business manager's request that he sign its working agreement (Tr. 403-405). Moreover, as the court below correctly concluded (Pet. App. 9a-11a), the Ninth Circuit's analysis in *Chewelah* is inconsistent with this Court's decision in *ABC* (see 621 F.2d at 1036-1037). Finally, in response to the Board's petition for rehearing, the Ninth Circuit, on December 8, 1980, added the following qualification to its opinion in *Chewelah*: "The case may be different if there is evidence that the union's actual purpose in enforcing its bylaw [prohibiting members from working for nonunion employers] was to interfere with the employer's selection [of his bargaining representative]." A copy of the amended opinion and of the order providing for the amendment are reprinted at App., *infra*, 1a-5a.

[5] As the court of appeals noted (Pet. App. 12a-13a), in discussing the rationale for the Board's view that union discipline of a member with a substantial financial ownership interest in the employer is not covered by the section, "application of sec-

holding that Willey's securing of electrical permits for Drexel was consistent with supervisory rather than ownership status is clearly correct and, in any event, involves no more than the application of settled principles to the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983

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tion 8(b)(1)(B) in that situation would, through the subterfuge of protecting the employer's selection of his representative, effectively deprive the union of all economic weapons, merely because the employer assumes the additional role of a supervisor." See *Glaziers and Glassworkers Local 1621*, 221 N.L.R.B. 509, 512-513 (1975); *Local 146, Sheet Metal Workers*, 203 N.L.R.B. 1090, 1093-1094 (1973). In addition, as the court further noted, "When a person has a financial self-interest in the enterprise, 'it is difficult to envision circumstances where the employer would be greatly influenced in the performance of his grievance-adjustment or collective-bargaining functions where any decision he makes in those respects directly works to his benefit or detriment depending on how he decides it'" (Pet. App. 12a, quoting *Glaziers and Glassworkers Local 1621, supra*, 221 N.L.R.B. at 512).

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-3111
Filed Dec. 8, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 73, AFL-CIO, RESPONDENT.

Before: MERRILL and FARRIS, Circuit Judges, and BONSAL,* District Judge.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for a rehearing en banc and Judges Merrill and Bonsal would so recommend.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The opinion filed on June 25, 1980 is hereby amended per the attached copy.

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*Honorable Dudley B. Bonsal, United States Senior District Judge for the Southern District of New York, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-3111
Filed Dec. 6, 1980
AO June 25, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 73, AFL-CIO, RESPONDENT.

Before: MERRILL and FARRIS, Circuit Judges, and BONSAL,* District Judge

AMENDED OPINION

Petition for Enforcement of an Order of the National Labor Relations Board

FARRIS, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order holding the International Brotherhood of Electrical Workers, Local No. 73, in violation of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B). IBEW disciplined one of its members for violating a union bylaw that prohibited union members from working for nonunion employers. Because the union member who was disciplined was the grievance arbiter for Chewelah Contractors, Inc., the Board held that IBEW's action violated Section 8(b)(1)(B) even though IBEW did not represent Chewelah's employees. We deny enforcement of the order.

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*Honorable Dudley B. Bonsal, United States Senior District Judge for the Southern District of New York, sitting by designation.

Prior to May, 1976, William Anderson was an employee of Electric Smith, Inc. and was a member of IBEW, the bargaining representative of Electric Smith's employees. Robert LeCount was the corporate vice-president of Electric Smith. In February, 1976, Anderson and LeCount formed Chewelah Contractors, Inc. Both Anderson and LeCount made substantial unsecured loans to Chewelah. In May, 1976, Anderson terminated his employment with Electric Smith and began working for Chewelah as a vice-president. Therefore, he became a member of Chewelah's board of directors. His responsibilities, according to LeCount, President of Chewelah, included serving as Chewelah's grievance arbiter.

Anderson remained a member of IBEW even though the union did not represent Chewelah's employees. IBEW charged Anderson with violating its bylaw prohibiting members from obtaining employment with nonunion employers. The union fined Anderson $1,250 and placed him on probation for one year. On October 7, 1976, Anderson filed a charge against IBEW with the NLRB, and the Board's General Counsel issued a complaint alleging that IBEW had violated Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B), by restraining or coercing Chewelah in the selection of its representative for collective bargaining or the adjustment of grievances. On May 6, 1977, an administrative law judge issued a decision finding a violation as alleged. The NLRB approved the decision and ordered IBEW to cease and desist from further violations, to rescind the fines it had imposed upon Anderson, and to post an appropriate notice. 231 N.L.R.B. 134.

Section 8(b)(1)(B) provides: "It shall be an unfair labor practice for a labor organization ... to restrain or coerce ... an employer in the selection of his representatives for the purposes of collective bargaining or the

adjustment of grievances." 29 U.S.C. § 158(b)(1)(B). Section 8(b)(1)(B) was intended to prohibit a union from dictating "who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling girevances." S. Rep. No. 105, 80th Cong., 1st Sess. pt. 1, p. 21 (1947). The major concern of Congress was to prevent unions from forcing employers into or out of multiemployer bargaining units. *Florida Power & Light Co.* v. *International Brotherhood of Elec. Workers*, 417 U.S. 790, 803 (1974). Section 8(b)(1)(B) was also intended to guarantee that an employer's bargaining representative would be completely faithful to the employer's desires. *See Wisconsin Electric Power Co.*, 192 N.L.R.B. 77, at 78 (1971). There is a basis for these concerns when the union charged with influencing an employer's choice of bargaining representatives is the bargaining representative of that employer's employees.

Union activity which Section 8(b)(1)(B) has been found to prohibit includes 1) picketing a company in an attempt to force the employer to dismiss a labor relations consultant thought to be "anti-union," *Helen Rose Co.*, 127 N.L.R.B. 1543 (1960), 2) attempting to force employers to join or resign from multiemployer bargaining associations, *United Slate Tile & Composition Roofers, Local 36*, 172 N.L.R.B. 2248 (1968), 3) attempting to force employers to select foremen from the ranks of union members, *Graphic Arts League*, 87 N.L.R.B. 1215 (1949), 4) expelling a union-member foreman from the union for assigning bargaining unit work in violation of a collective-bargaining agreement, *Northwest Publishers, Inc.*, 172 N.L.R.B. 2173 (1968), 5) penalizing union members for performing their nonunion supervisory duties during a strike, and forbidding them from resigning from the union to avoid further threats, *American Broadcasting Cos.* v. *Writer's Guild*

of America, West, Inc., 437 U.S. 411, 431-37 (1978). In every decision that has come to our attention, the union charged with violating Section 8(b)(1)(B) represented or demonstrated an intent to represent the complaining company's employees. Here, IBEW neither represents Chewelah's employees nor has it demonstrated a desire to represent the employees. The union had no incentive to either influence Chewelah's choice of bargaining representatives or affect Anderson's loyalty to Chewelah. Further, the acts complained of did not deprive Chewelah of a loyal bargaining representative. Their purpose was to enforce a presumably valid bylaw which one of its members had violated.

The union's action was also not inherently destructive of Chewelah's right to choose a loyal bargaining representative. The representative Chewelah chose was a member of a union which prohibited its members from working for nonunion employers. The Board does not question the validity of this bylaw. Anderson could have avoided the penalty for violating his union's bylaw by resigning from the union before he started work for Chewelah.

The union does not violate Section 8(b)(1)(B) by disciplining one of its members for working for a nonunion employer in violation of union bylaw, even though that member is also the bargaining representative of his employer, if the union neither represents nor has demonstrated an intent to represent the employer's employees. The case may be different if there is evidence that the union's actual purpose in enforcing its bylaw was to interfere with the employer's selection.

Enforcement of the Board's order is denied.